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No. 00-454

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amicus Curiae, Association of American Railroads, addresses the following question:

> Whether an Indian tribe lacks jurisdiction to impose a tax on nonmember activities and transactions on nonmember fee lands (or their equivalent) within an Indian reservation?

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INTEREST OF AMICUS CURIAE[1]

The Association of American Railroads ("AAR"), a non-profit national trade association representing the Nation's major railroads, appears in this case as an *amicus curiae* because its members have a vital interest in ensuring that their property interests and activities within Indian reservations and across Indian lands are subject to clear jurisdictional rules that will not hinder the railroads' ability to provide interstate rail service. All parties have consented to AAR's *amicus* participation. AAR's members include intercity passenger, commuter and freight railroads. The freight railroad members operate 76 percent of the line-haul mileage, employ approximately 90 percent of the workers, and account for approximately 93 percent of the freight revenues of all railroads in the United States. In addition, AAR member railroads operate on longstanding rights-of-way granted by the federal government that cross dozens of different Indian reservations in the United States, and some of their railroads also run through areas located adjacent to Indian reservations, but within areas over which Indian tribes or groups assert civil jurisdiction.

AAR represents its member railroads before courts, agencies, and the United States Congress on matters of common concern to its members. It has filed briefs *amicus curiae* before this Court.[2] The decision below may have a

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[1] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief.

[2] *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, U.S. Supreme Court Cause No. 99-2035 (filed December 4, 2000); *Burlington Northern R.R. v. Blackfeet Tribe*, U.S. Supreme Court Cause No. 91-545 (filed November 1, 1991); *Southern Pacific Transportation Co. v. Hernandez*, U.S. Supreme Court Cause No. 91-293 (filed

serious adverse effect on the railroad industry, since it exposes the industry to extensive and potentially burdensome tribal taxation and regulation of railroad properties and activities. Railroads have little or no voice in tribal governments and, like other nonmember businesses, are targets for taxing and other revenue raising efforts tribes may seek to impose without adversely affecting their own members. Tribal taxation of railroad properties and associated rail transportation activities could have dramatic and negative impacts on the railroad industry and the free flow of interstate commerce.

America's railroads cross the lands or reservations of a large number of tribes that may seek to impose a variety of taxes and regulatory schemes on railroad property or activities. It is critical to railroads and others doing business on Indian reservations for there to be reliable and objectively discernable guideposts for determining whether a particular tribe has jurisdiction—including the power to tax—over railroads and other businesses. The decision below significantly blurs the applicable standards and impairs the railroads' abilities to reliably predict tribal taxing powers.

SUMMARY OF ARGUMENT

As governments whose sovereignty is narrowly confined, *see generally United States v. Wheeler*, 435 U.S. 313, 326 (1978), Indian tribes generally lack civil jurisdictional authority over the property and activities of nonmembers on nonmember fee lands. As to nonmember fee lands, this rule derives from *Bates v. Clark*, 95 U.S. 204 (1877). In the last 20 years, this Court has reaffirmed and clarified the general rule that tribes lack jurisdiction over nonmember lands and associated activities except in very specific and narrow

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September 18, 1991); *Burlington Northern R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454 (1987).

circumstances. *See, e.g., Montana v. United States*, 450 U.S. 544 (1981); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). The court below misconstrued this Court's recent pronouncements and has misunderstood the historical underpinnings of those decisions.

The historical record of judicial decisions, administrative interpretations, and learned commentators demonstrates that Indian tribes were understood to lack jurisdictional authority over nonmember activities on nonmember lands, unless a treaty or federal statute conferred such power on the specific tribe involved. *See Bates v. Clark*, 95 U.S. 204 (1877). The modern application of this rule is reflected, as to fee lands, in *Montana*, and as to rights-of-way, in *Strate*. This Court's decisions establish that land status is a critical determinant of the scope of tribal powers.

Recent Congressional action defining "Indian country" for purposes of state or federal criminal jurisdiction and authorizing specific delegations of power through statutes like the Clean Water Act do not qualify as federal statutes that authorize the exercise by Indian tribes of general civil jurisdiction over nonmembers. Here, unlike the situation in *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), no treaty or federal statute confers any civil jurisdiction upon the Navajo Nation that would support the asserted tribal tax.

The Court of Appeals for the Tenth Circuit has devised an interpretation of *Montana*'s "consensual relationship" exception that would enable tribes to exercise civil jurisdiction over even the most casual visitor who traverses a reservation. To reach that result, the court below misinterprets this Court's clear and unequivocal decisions. *Amicus* submits that this Court's decisions require that for a "consensual relationship" to support the exercise of tribal jurisdiction, the relationship must be between the tribe and the entity or person to be regulated, must be clear and contractual, reflecting consent to jurisdiction, and must

directly concern the subject matter of the asserted tribal jurisdiction. That definition will provide predictability to those doing business on Indian reservations. The Court should reverse the decision below and clarify standards defining a consensual relationship "of the qualifying kind." *Strate*, 520 U.S. at 457.

ARGUMENT

I. TO AFFORD PREDICTABILITY, LAND STATUS SHOULD REMAIN A CRITICAL FACTOR IN DEFINING TRIBAL JURISDICTION OVER NONMEMBER PROPERTY AND ACTIVITIES.

A. This Court's Decisions Make Plain that Land Status is the Predominant Factor in Evaluating Tribal Jurisdiction over Nonmembers.

This Court's decisions concerning the scope of tribal civil jurisdiction have consistently focused on land status as a central factor in concluding that Indian tribes generally lack the power to tax and regulate nonmember activities and property on nonmember lands located within reservation boundaries. *See, e.g., Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *South Dakota v. Bourland*, 508 U.S. 679 (1993); *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989); *Montana v. United States*, 450 U.S. 544 (1981). These cases reflect that land status is a critical, if not determinative, factor in defining the geographic scope of tribal jurisdiction. *See also Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). The conclusion of the court below that "fee status is simply *one* factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe but not *the* determining factor," cannot be reconciled with this Court's opinions. *Atkinson*

Trading Co. v. Shirley, 210 F.3d 1247, 1256 (10th Cir. 2000) (emphasis in original).

The "path-marking case concerning tribal civil jurisdiction over nonmembers" is *Montana v. United States*, 450 U.S. 544 (1981). *Strate*, 520 U.S. at 445.

> *Montana* . . . described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: [3] The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health, or welfare.

Id. at 446.[4] In *Montana*, the Court's discussion of the scope of tribal sovereignty referred repeatedly to the concept that

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[3] In *Montana*, the Court confirmed that, if an exception applies, the tribe *may* have the authority to "regulate, through *taxation*, licensing, or other means the activities of nonmembers...." 450 U.S. at 565 (emphasis added). This statement draws a clear parallel between the scope of a tribe's regulatory and taxing jurisdiction. As discussed below, in *Strate*, the Court confirmed that the scope of regulatory authority equates to a tribe's adjudicatory authority. This straightforward parallelism hews to historical precedent.

[4] In *Strate*, the Court compared a tribe's limited civil authority over nonmembers with the absence of any tribal criminal jurisdictional authority over nonmembers. *Id.* at 445, *citing Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). Justice Ginsberg in *Strate*, and the Court in *Montana*, noted that "*Oliphant* rested on principles that support a more 'general proposition'." *Strate*, 520 U.S. at 445, *quoting Montana*, 450 U.S. at 565. That "general proposition" in essence is that Indian tribes, as limited sovereigns, historically lacked jurisdiction over nonmembers and their lands and activities. Historical understandings would support a simple rule that Indian tribes lack civil jurisdiction over nonmembers' fee lands (and their equivalent, including federally-granted rights-of-way) and activities on those lands. *See* Point I.B, *infra*.

general principles of tribal sovereignty do not support the exercise of tribal jurisdiction over nonmember property and activity on nonmember fee lands. *See* 450 U.S. at 564-65 ("hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations"). Then, after describing the two limited exceptions that "may" support tribal jurisdiction over activities on nonmember fee lands, the Court concluded that neither exception applied to "[n]on-Indian hunters and fishermen on nonmember fee land," and distinguished these lands from "lands still owned by or held in trust for the Tribe or its members." 450 U.S. at 566-67. The Court's analysis and result in *Montana*, particularly when contrasted with the decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), a case arising on tribal trust lands, demonstrate the critical impact of land status and of a tribe's loss of the power to exclude.

The Court's decision in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982), is consistent with *Montana*. There, while upholding the Tribe's authority to tax oil and gas lessees' activities on tribal trust lands on the reservation, the Court stated: "[A] tribe has the power to tax nonmembers only to the extent the nonmember enjoys the privilege of trade or other activity on the reservation to which the tribe can attach a tax. . . . A tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the Tribe." 455 U.S. at 141-42. There, the nonmembers were operating pursuant to a contract with the Tribe on on-reservation tribal trust lands.[5]

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[5] *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), fundamentally a state tax case, is also consistent with *Montana*. There, the Court rejected the state's argument that the Tribes lacked the power to tax transactions on trust lands, stating: "Executive branch officials have consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-

In *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), the Court considered once again the scope of a tribe's power to regulate nonmember lands and activities. There, Justice White stated that, as to all nonmember lands, "the Yakima Nation no longer has the power to exclude fee owners from its land within the boundaries of the reservation." *Id.* at 424. "Therefore, that power can no longer serve as the basis for tribal exercise of the lesser included power [to regulate]." *Id.* Inasmuch as there is no evidence in the record that the Navajo Nation has engaged in any "historic and consistent" effort to limit access, maintain control over, or preserve the character of the area in which the Cameron Trading Post and related facilities are located, the Court's analysis applicable to the "closed" portion of the Yakima Reservation is inapposite because there is no evidence the Navajo Nation ever sought to exercise a power to exclude with respect to the Atkinson lands. *See* 492 U.S. at 438-40 (Stevens, J.).

The Court next emphasized the critical significance of the loss of power to exclude in *South Dakota v. Bourland*, 508 U.S. 679 (1993). There, the Court stated:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case [broadly opened to the public], implies the loss of regulatory jurisdiction over the use of the land by others.

Id. at 689. The *Bourland* Court observed: "regulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11, *citing Brendale*, 492 U.S. at 423-24 (White, J.).

Indians *on Indian reservation lands in which the tribes have a significant interest.*" 447 U.S. at 152 (emphasis added).

Consequently, where a tribe has no right to exclude nonmembers from particular lands within a reservation, the tribe will ordinarily lack the power to regulate or tax those lands or their use.

The unanimous Court in *Strate* laid to rest any doubt regarding the significance of land status and the power to exclude. There, the Court determined that federally-granted rights-of-way crossing Indian reservations were the equivalent of fee lands, and thus were governed by the jurisdictional analysis prescribed in *Montana*. 520 U.S. at 456. In reaching this conclusion, the Court rejected the tribal court plaintiffs' contention that tribal courts possess general jurisdiction within reservation boundaries without regard to land status. Having concluded that the highway right-of-way was the equivalent of fee land,[6] the Court held that tribal court jurisdiction could not be sustained unless the tribal court plaintiffs could establish that either of *Montana*'s exceptions applied. If not, the main rule—driven by land status and the concomitant loss of the power to exclude—controlled. *Id.* at 456.

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[6] In *Burlington Northern R.R. Co. v. Red Wolf*, 522 U.S. 801 (1997), where the Court issued a writ of *certiorari*, vacated a decision of the Ninth Circuit, and remanded for further consideration in light of *Strate*, the Court signaled that other federally-granted rights-of-way also are subject to the analysis in *Strate*. The Ninth Circuit then properly applied *Strate* to federally-granted railroad rights-of-way. See *Burlington Northern R.R. Co. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000). More recently, the Ninth Circuit recognized that *Strate* required the overruling of its earlier decision in *Burlington Northern R. R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), because *Blackfeet Tribe* failed to recognize that the railroad right-of-way at issue there was the equivalent of fee lands. Hence, the court held that the tribal taxes levied on utility properties could not stand in light of *Strate*. *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

Finally, in *Venetie*, this Court unanimously rejected the Ninth Circuit's multi-factor test, similar in the unpredictability of its application to the sliding scale proposed by the Court below. *See Atkinson*, 210 F.3d at 1255. Instead, this Court's decision in *Venetie* focused on the land status and federal superintendence of specific lands in reaching its conclusion that the Native Village lacked the power to tax. *See* 522 U.S. at 525-27. Even though the business activities subject to the asserted tribal tax occurred on lands owned in fee by the Native Village, the Court stated that the Village could not tax the activities since the lands were not reservation lands, were not trust allotments, were not lands set aside by the federal government for the use of the Indians, and were not subject to the superintendence of the federal government. *Id.* at 526-32. *Venetie* and this Court's other decisions lead to the conclusion that the court below erred when it stated that "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." *See* 210 F.3d at 1254. *Montana*'s "main rule" is that tribes generally lack civil jurisdiction over nonmembers on nonmember fee lands and on federally-granted rights-of-way.

The Court has worked hard to clarify and define the powers of Indian tribes over nonmembers on nonmember fee lands or their equivalent. However, the decision below ignores this Court's writings, expands beyond recognition the narrow exceptions potentially available that might support assertions of tribal jurisdiction, and cannot be harmonized with this Court's decisions in *Montana*, *Brendale*, and *Strate*. This case presents the Court with an important opportunity to clarify its jurisprudence concerning the scope of tribal jurisdiction over nonmember property and activities on nonmember-owned fee lands.

B. Historical Understandings and Contemporaneous Interpretations Demonstrate that Tribal Jurisdiction is Significantly Reduced on Nonmember Fee Lands or Their Equivalent.

1. Absent powers conferred by treaty or Congress, historically, Indian tribes lacked jurisdiction over nonmembers on fee lands.

The decision below runs counter to pertinent historical federal decisions and policies and contemporaneous understandings concerning tribal jurisdiction. The "common notions" held by all branches of the federal government during the nineteenth and early twentieth centuries, *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978), reflect clearly that Indian tribes generally lacked civil jurisdiction over nonmembers. As this Court stated in *Solem v. Bartlett*, 465 U.S. 463, 468 (1984), a reservation disestablishment case:

> The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians.

Citing Bates v. Clark, 95 U.S. 204 (1877) and *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). Land title and whether real property retained any trust or restricted status, and not reservation boundaries, were then considered determinative of jurisdictional issues.[7]

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[7] The absence of any remaining tribal or Indian interests is particularly significant where, as here, tribal *civil* jurisdiction over nonmembers is asserted, and questions of state or federal *criminal* jurisdiction (following

Bates v. Clark, 95 U.S. 204 (1877), provides historical standards this Court has used repeatedly to determine jurisdiction over nonmember lands. In that case, involving a civil claim that military officials trespassed and improperly seized a quantity of whiskey, the Court stated:

> The simple criterion is, that, as to all lands thus described, it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.

95 U.S. at 208 (emphasis added).[8] As this Court noted in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613 n. 47 (1977),[9] when "Indian title had been extinguished, . . . the

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the "uncoupling of reservation status from Indian ownership" in the 1948 Major Crimes Act, *see Solem*, 465 U.S. at 468) are not. *See* Point I.B.3, *infra*.

[8] The Court's ruling in *Montana* reaffirmed that congressional action may confer tribal jurisdiction. *See Montana*, 450 U.S. at 564. However, short of a treaty provision or act of Congress, when a tribe cedes the power to exclude, tribal jurisdiction over nonmembers activities ceases (absent the exceptions the Court described in *Montana*.).

[9] In *Rosebud*, tribal *amici curiae* advised this Court:

> [A]t the time the *Rosebud* statutes were enacted [in 1904, 1907, and 1910], the 'title theory' was dominant. A Congressman then would have assumed. . . that each parcel ceased to be Indian country upon the extinguishment of Indian ownership. The term "diminished" would mean diminished in ownership, not boundaries, since ownership was then thought to be the significant jurisdictional factor.

Brief of *Amici Curiae* National Congress of American Indians, *et al.*, 28, *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

jurisdiction of the State . . . was full and complete." *Citing Dick v. United States*, 208 U.S. 340, 352 (1908). Thus, resolution of questions of title also was understood to resolve questions of federal, tribal, or state jurisdiction, absent an express congressional statement that federal or tribal jurisdiction should be preserved.[10] This understanding persuasively supports *Montana*, *Strate* and the Court's other recent cases which equate the loss of tribal power to the loss of the power to exclude.

Prior to and contemporaneous with 1934, Indian tribes were not recognized as having the power to tax nonmembers on nonmember lands absent a Congressional expression of intent to that effect. In 1942, just after the 1934 Arizona Boundary Act, 48 Stat. 960, that extended the Navajo Reservation into the vicinity of the Atkinson Trading Company lands, Felix S. Cohen, stated:

> The power to tax nonmembers is derived in the cases from the authority, founded on original sovereignty and guaranteed in some instances by treaties, to remove property of nonmembers from the territorial limits of the tribe. Since the tribal government has the power to exclude, it can extract a fee from nonmembers as a condition precedent to granting permission to remain or to operate within the tribal domain.

Felix S. Cohen, *Handbook of Federal Indian Law*, 266-67 (1942 Ed.) Of course, where a tribe has lost the power to exclude, that limited power "to extract a fee" also is lost. The historical authority relating to the taxing power of tribes confirms that Indian tribes lacked the inherent power to tax

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[10] In *Dick v. United States*, 208 U.S. 340 (1908), the Court emphasized that in *Bates* the Court "took care" to note that an exception to the general rule would apply where Congress or a treaty provision preserved tribal jurisdiction.

nonmember activities on nonmember fee lands within a reservation.

Indian tribes were understood historically to lack jurisdiction over nonmember activities on nonmember lands absent an expression from Congress to the contrary. Because jurisdiction was understood contemporaneously to follow title, when the Navajo Reservation was extended in 1934 to include lands in the vicinity of the Cameron Trading Post, the contemporaneous understanding would have been that the Navajo Nation lacked jurisdiction over Atkinson Trading Company's fee lands. That the Navajo Nation lacked any interest in those lands would have been considered determinative historically, and at least should be held to have significantly reduced the power of the Navajo Nation over the lands and activities. A tribe can exercise no civil jurisdiction over nonmember activities on fee lands or rights-of-way, unless the tribe can demonstrate that one of the two *Montana* exceptions applies.

2. *Buster v. Wright* and other historical tribal tax precedent do not support the exercise of tribal taxation here.

Tribal tax cases decided around the turn of the century support the absence of tribal jurisdiction over nonmember fee lands and associated activities.

The Tenth Circuit's extensive reliance on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), to support the notion that the Navajo Nation has the power to tax activities on Atkinson Trading Company's fee lands, is misplaced. *See* 210 F.3d at 1255-56, 1258-63.[11] After discussing the scope of the powers

[11] That "*Buster* and *Merrion* use similar language and similar analysis in their consideration of tribal taxing powers on activities taking place on fee lands and tribal lands" 210 F.3d at 1258, relates to the fact that *Merrion* arose on tribal trust lands, and *Buster* involved a circumstance

of Indian tribes and the Creek Nation, the Eighth Circuit in *Buster* specifically considered this Court's decision in *Bates v. Clark*, 135 F. at 952, and the "rule" that when Indian title is extinguished, so too is tribal jurisdiction. In clear language, the court noted that:

> the case before us falls not under the rule [in *Bates*], but under the exception to the rule [i.e., where Congress or a treaty provides otherwise], set forth in the opinion cited. The rule applies to the extinguishment of the original Indian title by occupancy. The case under consideration involves the extinguishment of no such title. The rule governs cases in which a different rule is not made applicable by treaty or by act of Congress. . . . The Creek Nation...held its territory under a patent from the United States and under an act of Congress which expressly provided that it should be the country of the Creeks "so long as they shall exist as a nation and continue to occupy" it. They still exist as a nation, and they still continue to occupy that country, notwithstanding the fact that those who are noncitizens of their tribe hold the title to and occupy isolated lots and tracts of land therein.

Id. Thereafter, the Eighth Circuit noted that a 1901 agreement with the Creek Nation guaranteed the continued jurisdiction of the Creek Nation until 1906, when that jurisdictional authority was to be extinguished absent some further act of Congress. *Id.* at 953. Finally, the court stated:

> The treaties and agreements between the United States and the Creek Nation under which title from the United States and jurisdiction to govern its country within the limits of its patent were guarantied to it, the acts of Congress, and the decisions of the courts which have

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where the treaty and federal statutes involved preserved the tribal power to tax. *Montana* 's essential distinction was not presented in either case.

> respected and sustained that jurisdiction, clearly take this case out from under the general [Bates] rule that the extinguishment of original Indian title by occupancy removes land from the Indian country . . . .

Id. These determinations were made against a historical backdrop that clearly and unequivocally confirmed that, as of 1901, under prior treaties and federal statutes, the Creek Nation had taxing power over the nonmember purchasers. *Id.* at 953-54, *citing* Act of June 28, 1898, 30 Stat. 495; 23 Op. Atty. Gen. 214, 217-220 (1900).[12] Therefore, as was the case with the Cheyenne River Sioux Reservation in *Solem*, the Creek Nation retained an "interest" in the lands at issue pursuant to congressional authority so as to preserve limited tribal powers.

This Court's decision in *Morris v. Hitchcock*, 194 U.S. 384 (1904), upholding the Chickasaw Nation's power to tax, also was premised on the same foundation: specific treaties and federal statutes authorized the Chickasaw Nation's power to tax. *See also Maxey v. Wright*, 3 Ind. T. 243, 54 S.W. 807, *aff'd*, 105 F. 1003 (8th Cir. 1900), where the court upheld the Creek Nation's power to impose a tax on attorneys, premised specifically on a treaty provision preserving the power. 54 S.W. at 808-10. However, the Creek Nation itself was not empowered under the applicable treaty to collect the tax itself, and would only have had the power to request removal of attorneys who failed to pay the tax. By virtue of a separate federal statute, the Department of the Interior held the power to collect the tax for the Nation. *Id.* at 810-12. Moreover, in

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[12] Felix S. Cohen observed that "there are important fields in which Oklahoma Indians have received distinctive treatment and which present distinctive legal problems. These fields include...property laws affecting the Five Civilized Tribes [including the Creek Nation], taxation...." Felix S. Cohen, *Handbook of Federal Indian Law*, 425 (1942 Ed.) (Chapter 23, "Special Laws Relating to Oklahoma").

Maxey, the attorneys' activities were on lands owned by the Creek Nation, subject to restrictions on alienation. *Id.* at 811.

This Congressional intent was bolstered because the nonmember in *Buster* entered the Creek Reservation to do business with notice of the tribal power over the lands in question. Consequently, *Buster* may reflect a very fact-specific consensual relationship. *See Strate*, 520 U.S. at 457.

Here, the Navajo Nation can point to no treaty or congressional act that serves to take Atkinson Trading Company's lands out of the general rule in *Bates v. Clark*. The 1934 Arizona Boundary Act, 48 Stat. 960, that extended the Navajo Reservation to include lands in the vicinity of Cameron Trading Post, contains nothing that would support the exercise of tribal jurisdiction over those nonmember owned fee lands. And, Atkinson Trading Company clearly had no notice of the potential assertion of tribal taxing power when it acquired the lands well before 1934, hence, there can be no consensual relationship, even under a *Buster* analysis. Given that the Navajo Nation lacks any inherent power over Atkinson Trading Company, the Court should reverse the decision below.

3. Recent Congressional action—defining federal and state criminal jurisdictional boundaries—cannot change widely held historical understandings concerning tribal civil jurisdiction over nonmembers.

The decision below improperly attempts to support its analysis by references to the definition of "Indian country" for criminal jurisdictional purposes. *See* 210 F.3d at 1257. In 1948, Congress enacted a statutory definition of "Indian country" for purposes of drawing the line between federal and state jurisdiction over certain crimes under the Major Crimes Act. *See* 18 U.S.C. § 1151 (2000). In that definition, Congress chose, for criminal jurisdiction purposes (but as between the federal government and states only), to uncouple

the direct relationship between title and jurisdiction. In some respects, the Major Crimes Act codified the results in certain decisions of this Court regarding whether states or the federal government enjoyed prosecutorial powers. *See, e.g., Donnelly v. United States*, 228 U.S. 243, 269 (1913) (lands within a reservation legal title to which is held by the United States were "Indian country"); *United States v. Sandoval*, 231 U.S. 28, 46 (1913) (Pueblo lands subject to restrictions on alienation were "Indian country"); *United States v. Pelican*, 232 U.S. 442, 449 (1914) (allotted lands were "Indian country"); and *United States v. McGowan*, 302 U.S. 535, 539 (1938) (lands validly set apart for the use of the Indians and under the superintendence of the United States were "Indian country").

However, those decisions did not address whether Indian tribes themselves might have civil or criminal jurisdiction over nonmember fee lands or lands subject to federally-granted rights-of-way or over activities of nonmembers on those lands. Moreover, Section 1151(a) neither granted nor confirmed tribal civil jurisdiction over nonmember activities on nonmember lands or rights-of-way. *See Solem v. Bartlett*, 465 U.S. 463, 468 (1984) ("only in 1948 did Congress uncouple reservation status from Indian ownership and statutorily define Indian country to include lands held in fee by non-Indians within reservation bounardies"); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 358 & n.16 (1962).[13] While Congress' choice may have made sense to allocate prosecutorial prerogatives between state and federal governments, it does not justify employing a criminal statute to overturn this Court's historic decisions

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[13] *United States v. Baker*, 894 F.2d 1144, 1149 (10th Cir. 1990), relied upon by the court below, *see* 210 F.3d at 1258, is consistent with this conclusion. *Baker*, an appeal of a conviction in a criminal case, presented the question whether a state court had jurisdiction to issue a search warrant.

regarding the civil jurisdictional powers of tribes over non-members.

This Court has suggested that Congress' definition of "Indian country," can apply in the context of assertions of tribal civil jurisdiction. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998); *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975). (*Venetie* is not pertinent on the point presented here because that case addressed tribal, not nonmember, lands.) In any event, some lower courts have extended that proposition far beyond what *amicus* submits is appropriate. *See, e.g., Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1542 (10th Cir. 1995) ("We hold § 1151 represents an express Congressional delegation of civil authority over Indian country to the tribes."). Such holdings cannot be squared with this Court's decisions in *Brendale*, *Montana*, and *Strate*. The result in those cases would have been exactly the opposite were Section 1151 to define the limits of tribal power in the civil context. Therefore, the court below erred when it stated that the definition of "Indian country" reflected in 18 U.S.C. § 1151 resolves the inquiry presented here. *See* 210 F.3d at 1257-58.[14]

The decision below also misunderstands the Court's reference in *Montana* to Section 1151. In *Montana*, the Court, in the context of the hunting and fishing regulatory issue presented, stated: "If Congress had wished to extend tribal jurisdiction to lands owned by non-Indians [in 18 U.S.C. § 1165, prohibiting hunting and fishing on tribal lands, without lawful authority or permission from the tribe], it

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[14] The Tenth Circuit's citation to *Seymour v. Superintendent* and to Justice Blackmun's dissent in *Hagen v. Utah*, 510 U.S. 399, 425-26 (1994), provide no support for the court of appeal's decision. *See* 210 F.3d at 1257. Those decisions were rendered in criminal matters involving *habeas corpus* petitions challenging the criminal jurisdiction of state courts.

could have easily done so by incorporating in § 1165 the definition of 'Indian country' in 18 U.S.C. § 1151." *Montana*, 450 U.S. at 563. The Tenth Circuit misinterpreted the significance of this discussion. *See* 210 F. 3d at 1258 n.10. Rather than supporting the notion that 18 U.S.C. § 1151 somehow defines the geographic scope of a tribe's jurisdiction, the Court's quoted comment in *Montana* is an acknowledgment that Congress has the power to delegate regulatory authority to Indian tribes, but chose to exercise it in a limited fashion there—to apply only to trust lands, lands subject to restrictions on alienation and other lands reserved for Indian use. *See* 18 U.S.C. § 1165 (2000).[15] 18 U.S.C. § 1151 and its definition of "Indian country" for criminal jurisdiction purposes do not have the talismanic effect in the civil context as suggested by the Tenth Circuit.

Congress has demonstrated an ability to delegate powers in a variety of contexts, and has the power to define the geographic scope of those delegated powers in a way that may be appropriately tailored to the subject matter. *See e.g.*, 33 U.S.C. § 1377 (1994) (authorizing delegation to tribes of Clean Water Act regulatory power). And, Congress has chosen not to act in other circumstances. *See, e.g.*, *Backcountry Against Dumps v. EPA*, 100 F.3d 147, 150-51 (D.C. Cir. 1996) (rejecting the United States Environmental Protection Agency's effort to delegate regulatory authority under the Resource Conservation Recovery Act, 42 U.S.C. §§ 6901-6992 (1994), to an Indian tribe given the absence of

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[15] The legislative history of 18 U.S.C. § 1165 clearly reflects that the reference to "lawful authority or permission" was intended to authorize tribes to enact and apply regulations conditioning entry to tribal lands only. *See* S. Rep. No. 1686, 86th Cong. 2d Sess. (1960); *White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 534-35 (D.Minn. 1981), *aff'd*, 683 F.2d 1129 (8th Cir.), *cert. denied*, 459 U.S. 1070 (1982); *United States v. Pollmann*, 364 F. Supp. 995, 1001 (S.D. Mont. 1973); *cf. United States v. Von Murdock*, 132 F.3d 534, 535 (10th Cir. 1997).

Congressional action). The Court should clarify that 18 U.S.C. § 1151 relates solely to the determination of whether a state or the federal government has criminal jurisdiction over major crimes, and that Congress must act specifically to delegate federal powers to Indian tribes.

The Court's decisions for over a century repudiate unequivocally the Tenth Circuit's efforts to relegate land status to just another factor affecting tribal powers over nonmembers. The Court should reverse the decision below to retain the clarifying power of its land status jurisprudence.

II. THE COURT OF APPEALS' APPLICATION OF THE *MONTANA* EXCEPTIONS CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS IN *MONTANA* AND *STRATE*.

This Court's opinion in *Strate* reviewed exhaustively the sources and proper application of the two exceptions to "*Montana*'s main rule." 520 U.S. at 459 n. 14. With respect to the consensual relationship exception, the Court explained that the jurisdictional assertion must be directly related to and arise out of the consensual relationship to which the nonmember is a party. Although A-1 Contractors had a consensual relationship with the Three Affiliated Tribes of the Fort Berthold Reservation, the Court determined that the Tribes lacked adjudicatory jurisdiction because the tribal court plaintiff "'was not a party to the subcontract, and the [T]ribes were strangers to the accident.'" 520 U.S. at 457, *quoting* 76 F.3d at 940. Applied to the present controversy, these views lead ineluctably to the conclusion that the Navajo Nation lacks jurisdiction to impose its Hotel Occupancy Tax on casual visitors to, and guests of, Atkinson Trading Company, which operates exclusively on nonmember fee lands or their equivalent. Those visitors have no consensual relationship with the Navajo Nation.

The signal from the Court in *Strate*, however, was misunderstood by the court below and threatens to blur the clarity of the Court's jurisprudence on this question. Accordingly, this Court should clarify that its decisions prescribe a clear and unequivocal rule regarding the consensual relationships that satisfy *Montana's* first exception: there must be a contractual relationship between the person assertedly subject to tribal jurisdiction and the tribe (or, in an appropriate case, tribal member) asserting tribal jurisdiction, the relationship must reflect knowing consent, and the assertion of tribal power must relate to the subject matter of the consensual relationship.

Strate provides the clearest application of this rule. While A-1 Contractors had a contractual agreement to work on a project for a tribal entity, that consensual relationship did not satisfy *Montana's* first exception because the Three Affiliated Tribes "were strangers to the accident." 520 U.S. at 457. Here, the tax is imposed on guests of Atkinson Trading who concededly have no contractual arrangements with the Navajo Nation: their only dealings are with Atkinson Trading. Under *Strate*, Atkinson's dealings with individual tribal members are irrelevant. *See id.* Similarly, railroads' rights-of-way granted by the United States, even when consented to by a tribe, are not relationships that satisfy *Montana's* first exception. *See Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059, 1064 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000).

The decision below represents a significant misapplication of the two exceptions described in *Montana* and examined in *Strate*. Despite the Court's guidance in *Strate*, the court below used the services that the Navajo Nation may provide to the Trading Company and its guests, including police, fire, emergency medical and tourist services, tó construct a "consensual relationship" supporting Navajo Nation taxation of the guests. In essence, the decision below sanctions a form

of jurisdictional adverse possession: if a tribe makes services available, it can tax and regulate. *See* 210 F.3d at 1261-62. The decision below opens the door wide to analyses that would permit virtually any relationship regardless of how remote to support tribal jurisdiction. That approach drains any meaning from this Court's decision in *Strate* and its effort to provide predictability and a clear rule to govern when a consensual relationship would support tribal jurisdiction.[16]

In contrast, the Court of Appeals for the Ninth Circuit understood and correctly applied *Strate* in reaching its

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[16] The decision below similarly embraces a broad interpretation of the second *Montana* exception. Neither the district court nor the court of appeals ruled upon the merits of the second *Montana* exception, concerning impacts on health and welfare or political integrity, in this case. However, the courts below (the district court and the Navajo Nation Supreme Court) suggested an interpretation of the second *Montana* exception that would swallow the general rule that tribes lack jurisdiction. In footnote 8, the Tenth Circuit stated:

> . . . the power to tax might arise from the second "significant-impacts" exception to the *Montana* rule. In fact, the Navajo Supreme Court held as much, concluding that "[t]axation, that indispensable element of any government, surely has everything to do with the Navajo Nation's political integrity." R., Vol. II at 702. The district court appeared to condone the Navajo Supreme Court's conclusion, stating that "[c]onsideration of the other half of the *Montana* test, the significant impacts factor, in an appropriate case may be sufficient to allow the tribe to impose its tax."

210 F.3d at 1254 n.8. However, *Montana* requires that the nonmember "*conduct* threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 566 (emphasis added.) The decision below focuses not on the nonmember conduct, but instead on the tribe's need for revenues from some source to run its government. The comments of the district court and the Navajo Nation Supreme Court would appear to allow a tribe to impose a tax on the fee lands activities of nonmembers solely because tribal taxation is integral to a tribe's political integrity. This circular reasoning is wholly at odds with the Court's instruction that the Montana exceptions be narrowly construed and applied.

decision in *Big Horn County Electric Cooperative, Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). There, following *Strate*, the Ninth Circuit concluded properly that the Crow Tribe lacked jurisdiction to impose an *ad valorem* tax on the right-of-way properties of Big Horn since the consensual relationships Big Horn had entered with tribal members for the provision of electric services bore no relationship to the tax on utility assets the Tribe sought to impose. *Id.* at 951. In so holding, the Ninth Circuit overruled its decision in *Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), which had upheld tribal taxation of railroad rights-of-way. *Big Horn*, 219 F.3d at 953. The Ninth Circuit's conclusion that there is no consensual relationship supporting a tax on the value of railroad rights-of-way and attached properties is clearly correct under *Strate*.

The decision below turns the proper analysis of ascertaining whether tribes have taxing jurisdiction on its head. *See M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 429 (1819), where Chief Justice Marshall stated: "All subjects over which the sovereign power . . . extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation." Rather than first determining that a tribe has the power to tax, the court below has determined that where a tribe has governmental needs to be funded, it has the power to tax.

In *Strate*, Justice Ginsberg, writing for a unanimous Court, equated the scope of a tribal court's jurisdiction to the scope of an Indian tribe's legislative jurisdiction: "As to nonmembers, we hold, a tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." 520 U.S. at 453. While the issue presented in *Strate* related to tribal court jurisdiction, the rationale and statements of the Court clearly demonstrate that its analysis is applicable equally to the attempted exercise of tribal civil regulatory and taxing jurisdiction over nonmembers activities and property on

nonmember fee lands and federally-granted rights-of-way within reservations.

III. THE COURT OF APPEALS' "SLIDING SCALE" ANALYSIS WOULD DEPRIVE PERSONS PRESENT ON INDIAN RESERVATIONS OF PREDICTABLE JURISDICTIONAL GUIDE-LINES, AND WOULD ENGENDER TRIBAL TAXES UNRELATED TO NONMEMBERS' CONSENT.

The "sliding scale" or balancing test proposed by the Court below will undo fundamental propositions of federal Indian law that define the scope of tribal powers over nonmember activities on nonmember lands, and will yield a confused and unpredictable environment for nonmembers—whether they may be "passing through" or seeking to pursue productive economic activity on reservation lands. Such an approach is particularly troubling for enterprises such as interstate railroads and pipelines, which have significant investments that cannot easily be moved in the face of a hostile regulatory or taxing environment.

Given that Indian tribes retain limited sovereignty, it would indeed be ironic for tribes to have the authority to impose burdensome and costly taxes on nonmembers whose activities are on fee lands or their equivalent whenever the tribe arguably could provide services or "the benefits of a civilized society" to the nonmembers. *See* 210 F.3d at 1263. Given the absence of constitutional and Commerce Clause limitations on tribal taxation, s*ee Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 191-92 (1989) (Commerce Clause); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 56 (1978) (Constitution), tribal taxation in the absence of a meaningful consent can be particularly troubling. Many tribal tax schemes are designed carefully in order to shift tax burdens from tribal members to nonmembers. The Court

should reject the analysis of the courts below, confirm that land status remains a critical factor in determining whether a tribe has jurisdiction over nonmembers, and clarify that consensual relationships must, in fact, be consensual—putting the nonmember on clear and unequivocal notice of the prospective tribal jurisdictional assertion. Specifically, for a consensual relationship to qualify as a basis for the assertion of tribal jurisdiction, the relationship must be between the tribe and the person or entity to be regulated, the consent by the nonmember should be clear and contractual, reflecting consent to jurisdiction, and should relate directly to the activity that is the subject of the consensual relationship

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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